Case No. 22-5451

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, AND KENTUCKY, INC., on behalf of itself, its staff, and its patients, *et al.*,

Plaintiffs-Appellees

v.

DANIEL J. CAMERON, in his official capacity as Attorney General of the Commonwealth of Kentucky,

Defendant-Appellant

and

ERIC FRIEDLANDER, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services, *et al.*,

Defendants

On Appeal from the United States District Court
for the Western District of Kentucky
Case No. 3:22-cv-198

ATTORNEY GENERAL DANIEL CAMERON'S EMERGENCY MOTION FOR A PARTIAL STAY PENDING APPEAL

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INTRODUCTION

Kentucky's House Bill 3 is a comprehensive overhaul of several different laws regulating abortion. The topics range from informed consent to the proper disposal of fetal remains. HB 3's reforms are common-sense measures. One provision, for example, simply requires physicians to obtain a copy of government-issued identification and written consent from a legal guardian before performing an abortion on a minor. Nothing about that requirement should raise an eyebrow. And under normal rules—on statutory interpretation, constitutional avoidance, burdens of proof—there is no basis for enjoining enforcement of it.

Yet the district court enjoined Attorney General Cameron from enforcing that provision—along with dozens of others—after finding that they are impossible to comply with. Op. & P.I., R.65, PageID#1272. To reach that conclusion, the court imposed statutory requirements that do not exist. It invoked vagueness questions despite no party bringing such a claim. And it invited constitutional doubt by adopting a statutory construction that could have been avoided. At almost every juncture, the district court turned ordinary legal principles on their head.

Attorney General Cameron thus respectfully requests a partial stay pending appeal.[1] This motion is limited to two key parts of the district court's injunction: the informed-consent requirements in Section 1(2), (9), and (11),[2] and the provisions of Sections 20(3)–(4), 22(1)–(2) & (4), and 23(15) that govern fetal-remains disposal. The district court enjoined these provisions solely because they are impossible to comply with. That is manifestly wrong, and Kentucky suffers irreparable harm every day that the injunction is in effect.

STATEMENT

House Bill 3

The Kentucky General Assembly enacted HB 3 on April 14, 2022.[3] The law covers a lot of ground. It updates the notice-and-consent requirements for performing abortions on minors. § 1(2). It provides new registration requirements for physicians providing abortion-inducing drugs, § 6, changes the regulations governing fetal-remains disposal, §§ 20–22, and restricts abortions after the gestational age of 15 weeks, § 34. These are just a handful of the changes in HB 3.

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[1] By only requesting a partial stay, the Attorney General does not signal agreement with any other aspect of the district court's injunction. Those further issues will be addressed in merits briefing.

[2] Included in this request is a stay of the injunction against enforcing Sections 2(27) and 3(12) as applied to the provisions of Section 1 identified in this motion.

[3] A copy of the bill is available at R.1-1, PageID#25.

The district court enjoined the Attorney General from enforcing dozens of HB 3's provisions. This motion seeks to stay that injunction with respect to two groups of provisions: those in Section 1 covering informed consent, and those in Sections 20, 22, and 23 covering the disposal of fetal remains.

1. Section 1 of HB 3 prohibits physicians from performing abortions on minors without obtaining "informed written consent" from one "parent or legal guardian with joint or physical custody."[4] § 1(2). The informed consent must include a copy of the minor's government-issued identification and a copy of the same for the parent or guardian. § 1(2)(a)(2)(a). And it must include a certification from the parent or guardian attesting to his or her consent and authority to give consent. § 1(2)(a)(2)(b).

Section 1 also creates new requirements for emergency abortions when informed consent is not possible. Under Section 1(9), a physician can perform an emergency abortion on a minor without consent from a parent or guardian only if the physician determines that a "medical emergency exists." § 1(9)(a). In that case, the physician must make "reasonable attempts" (the minor's health permitting) to contact the parent or guardian and must inform him or her about the

[4] The law contains exceptions not relevant here, including a judicial bypass.

emergency within 24 hours. § 1(9)(b)–(c). The physician must also document the medical basis for the emergency abortion. § 1(9)(b).

Finally, Section 1(11) states that "[f]ailure to obtain consent pursuant to the requirements of this section is prima facie evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions." HB 3 did not amend this provision, which existed prior to the new law.

2. Section 20 requires a permit from the coroner before cremating the remains of a child after fetal death. This is the same permit already required for cremation under existing law. *See* Ky. Rev. Stat. § 213.081. HB 3 modified Kentucky law to include fetal remains after an abortion. But unlike cremation for non-fetal deaths, Section 20 provides that "fetuses may be cremated by simultaneous cremation." § 20(3).

Section 22 imposes new requirements on handling fetal remains. An abortion provider must notify the parents that they have the right to either "take responsibility" for disposing of the fetal remains or "relinquish the responsibility" to the provider. § 22(2)(a). It also requires abortion providers to document the choice. § 22(2)(d). And it prohibits providers from disposing of fetal remains as "medical or infectious waste," buying or selling fetal remains, or transporting fetal remains for purposes other than those specified. § 22(4). Finally, Section 23(15)

is a definitional provision that redefines the term "pathological waste" so that it does not include fetal remains.

The proceedings below

One day after the General Assembly enacted HB 3, Planned Parenthood sued the Attorney General to block its enforcement. Compl., R.1, PageID#3. This is a peculiar lawsuit. Planned Parenthood does not challenge the substantive requirements of HB 3 for imposing an undue burden on the right to obtain an abortion. Instead, it claims only that HB 3 creates a number of administrative requirements that are impossible to comply with until Kentucky's Cabinet for Health and Family Services creates some forms and promulgates some regulations. *Id.* at PageID#22 (¶ 67) (alleging that HB 3 "creat[es] a de facto ban on all forms of legal abortion" by "requiring Plaintiff to use agency forms and processes not yet available"). And so Planned Parenthood's theory of this case turns entirely on whether it can comply with each particular provision of HB 3.

Planned Parenthood immediately moved for a temporary restraining order and preliminary injunction. Mot., R.3, PageID#108. Consistent with the claims in its complaint, Planned Parenthood made several arguments that all boiled down to the same contention: HB 3 effectively bans abortion because it requires filling out forms and complying with regulations that do not yet exist. *Id.* at

PageID#108, 114–18. To this end, Planned Parenthood listed several specific provisions that it asserted "operate to bar abortion in Kentucky due to their immediate effect." *Id.* at PageID#117. But instead of asking to enjoin only enforcement of those provisions, it asked the court to bar HB 3 from taking effect—full stop.

The district court did just that. TRO, R.27, PageID#242. Although it acknowledged that a temporary restraining order is an "extraordinary remedy" that Planned Parenthood "bears the burden of justifying," *id.* at PageID#249–50 (citations omitted), it nevertheless shifted the burden onto the Attorney General and enjoined *the entirety* of HB 3 after determining that Planned Parenthood had failed to give the court enough information to "determine which individual provisions and subsections are capable of compliance," *id.* at PageID#242. The court did so even though Planned Parenthood *did not challenge* parts of HB 3.

Soon after, another abortion clinic, EMW Women's Surgical Center, and Dr. Ernest Marshall moved to intervene. Mot. Intervene, R.28, PageID#262. The court granted that motion two days later (without giving the Attorney General an opportunity to respond). Order, R. 32, PageID#386. It also directed EMW to file its own preliminary-injunction motion for consideration at the fast-approaching

evidentiary hearing. *Id.* at PageID#392. The only difference between EMW's motion and Planned Parenthood's is that EMW also challenged the 15-week prohibition in HB 3. Prelim. Inj. Mot., R.38, PageID#506.

The district court then held a hearing. Tr., R.51, PageID#654. It considered both the compliance argument and the 15-week-prohibition argument. *Id.* at PageID#772. Even though the Attorney General had disputed the Clinics' good-faith efforts at compliance, Resp., R.27, PageID#209–11, neither Planned Parenthood nor EMW put on any evidence to satisfy their burden under *EMW Women's Surgical Center, P.S.C. v. Friedlander*, 978 F.3d 418, 440–41 (6th Cir. 2020).

At the hearing, the district court stated that there was not enough "detail in the record to carry the burden as far as" which specific provisions the Clinics could comply with. Tr., R.51, PageID#785. And yet, as before, the court held that not against the Clinics but against the Attorney General. It extended the restraining order for two more weeks and asked for post-hearing briefing on the issues raised.[5]

[5] The district court slightly narrowed its restraining order after the hearing. It no longer enjoined enforcement of the provisions that were not new and the provisions the Clinics conceded did not apply to them. Order, R.49, PageID#645. But it enjoined enforcement of practically everything else. *Id.* at PageID#646–648.

The parties then submitted post-hearing filings. The Clinics reiterated their argument that several provisions of HB 3 are impossible to comply with before the Cabinet promulgates forms and regulations. But they also raised new arguments that were not in their preliminary-injunction motions. For example, as to the informed-consent requirements in Section 1, the Clinics argued that the words "government-issued identification" and "reasonable attempt" are too unclear to comply with. Prop. Findings & Conclusions, R.54, PageID#810, 813. That argument sounds like void-for-vagueness, but the Clinics never brought such a claim.

The Clinics also submitted post-hearing evidence in a last-ditch effort to resuscitate their claims. To prove that they made a good-faith effort at complying with the fetal-remains law, they submitted declarations vaguely asserting that they have "begun outreach to crematoria." *Id.* at PageID#868; Miller Decl., R.55, PageID#1044; Marshall Decl., R.56, PageID#1062. But the declarations lacked any kind of meaningful detail to assess good-faith efforts: no detail about when those efforts began, no detail about how many crematoria they contacted, no detail about what the timeline for compliance might be. And of course, those are the kinds of questions the Attorney General could have asked during cross-examination had the Clinics submitted this evidence in time for the hearing.

Nevertheless, the district court granted a preliminary injunction that largely mirrored its prior restraining orders. It enjoined enforcement of virtually every provision of HB 3 that requires an abortion provider to record or document any information on the grounds that the Cabinet must act before compliance is possible. Op., R.65, PageID#1290. The court applied that reasoning even to provisions that do not require filling out forms or complying with regulations.

The court also credited the Clinics' post-hearing declarations for establishing that the Clinics made a good-faith effort at compliance. And it held that terms like "government-issued identification" lack a level of precision that statutes must have for "highly regulated" industries. *Id.* at PageID#1267. Although it is unclear what constitutional rule the court relied on to reach that conclusion (as neither Clinic brought a void-for-vagueness claim), the court nevertheless held that the Clinics cannot comply until the Cabinet provides clearer definitions.

After the district court entered its preliminary injunction, Attorney General Cameron moved below for a stay pending appeal. Mot., R.67, PageID#1294. The district court denied that motion on May 26, 2022. Order, R.69, PageID#1304. This motion for a partial stay pending appeal follows.

ARGUMENT

The Court should grant a partial stay. Doing so requires considering familiar factors: whether the movant has made a strong showing that he is likely to succeed on the merits; whether he will be irreparably injured without a stay; the harm to other parties; and what the public interest favors. *Arizona v. Biden*, 31 F.4th 469, 474 (6th Cir. 2022). Here, a partial stay is warranted because the Attorney General is likely to succeed on the merits of his appeal as to the constitutionality of Section 1(2), (9), and (11) (informed consent), as well as Sections 20(3)–(4), 22(1)–(2) & (4), and 23(15) (fetal remains). The Clinics can immediately comply with these provisions. They do not require any forms or regulations from the Cabinet. And so there is no "de facto" ban on abortion from allowing these provisions to take effect.

I. The Attorney General is likely to succeed on the merits.

The sole basis for the district court's injunction was its conclusion that the Clinics "cannot comply" with the challenged provisions of HB 3 "until the Cabinet creates the required forms and promulgates the necessary regulations." Op., R.65, PageID#1272. Whether that's true is almost exclusively a question of statutory interpretation.

So two principles weigh heavily here. First, federal courts must interpret statutes to avoid creating constitutional problems. *Gonzales v. Carhart*, 550 U.S. 124, 153–54 (2007). If a statute *can* be reasonably interpreted to save it from unconstitutionality, it *must* be interpreted that way. *Id.* Second, "the text of the statute is supreme." *Owen v. Univ. of Ky.*, 486 S.W.3d 266, 270 (Ky. 2016). And just as the words the legislature chose are important, so too are the words it did not choose. Courts cannot "add or subtract" words from "the legislative enactment or discover meanings not reasonably ascertainable from the language used." *Edwards v. Harrod*, 391 S.W.3d 755, 757 (Ky. 2013) (citation omitted).

Together, these two principles all but resolve this motion. The district court adopted an atextual reading of HB 3 to arrive at an unconstitutional interpretation. Undoing that error leaves but one conclusion: the Clinics can obviously comply with the provisions at issue here because they do not depend on the Cabinet first creating any forms or promulgating any regulations.

A. The Clinics can comply with the informed-consent requirements.

The informed-consent requirements in Section 1(2), (9), and (11) are in no way impossible to comply with.

1. Section 1(2) requires a physician to obtain informed consent from a parent or guardian before performing an abortion on a minor. It also requires that

parent or guardian to make a "reasonable attempt" to notify another parent or guardian at least 48 hours before consenting. § 1(2)(a). And the informed consent must include certain items, including a copy of the minor's "government-issued identification." *Id.*

The Cabinet is not required to promulgate any forms for compliance with Section 1(2). In fact, the word "form" does not appear anywhere in this subpart. So there is no basis for concluding that it is impossible to comply with Section 1(2) until the Cabinet creates a form.

The district court's contrary conclusion rested on several errors. The court first held that abortion providers cannot comply with Section 1(2) until the Cabinet creates a form because "Section 13 requires the Cabinet to create and distribute forms for section[] 1." Op., R.65, PageID#1259. But that reads words into Section 13 that do not exist. Section 13 states only that the Cabinet must "create and distribute the report forms *required* in Sections 1, 4, 8" and several other sections. § 13(1) (emphasis added). But the part of Section 1 at issue here—Section 1(2)—does not "require[]" any "report forms."

To be sure, that reading does not render Section 13 superfluous. There *is* a provision in Section 1 that requires abortion providers to file a "report . . . on a form supplied by the cabinet." § 1(10). And so it makes sense that Section 13

directs the Cabinet to create or distribute a form for Section 1. But it does not follow that Section 1(2)—a provision that does not refer to any forms—is somehow dependent on a form being created.

In any event, whatever might be said about the district court's interpretation of Section 13 and Section 1(2), it is certainly not true that the *only* reasonable interpretation of these provisions is that Section 1(2) requires abortion providers to obtain informed consent on a form provided by the Cabinet. And so the court should have adopted an interpretation of the statute preserving its constitutionality. *See Gonzales*, 550 U.S. at 153–54.

2. Likewise for Sections 1(9) and 1(11). Section 1(9) provides that the informed-consent requirements do not apply if there is a medical emergency. And Section 1(11) imposes evidentiary consequences in civil proceedings for a physician who fails to obtain informed consent. Neither of these provisions use the word "form" or "report." So there is no basis to conclude that compliance is impossible until the Cabinet creates a form that is not statutorily required.

3. The district court also concluded that Section 1(2) is impossible to comply with because the terms "government-issued identification" and "reasonable attempt" are unclear. Op., R.65, PageID#1261. The court explained that the Clinics cannot obtain a copy of a "government-issued identification" because HB 3

does not define that term. *Id.* It also held that the Clinics cannot have a parent or guardian make a "reasonable attempt" to notify other custodial guardians because the "Kentucky Legislature does not specify what type of a search must be made." *Id.* This conclusion is wrong for two reasons.

First, it's not clear what constitutional right the district court was enforcing as it combed through HB 3's words. The analysis sounds like void for vagueness, but the Clinics have not brought that claim.

Even still, a statute is unconstitutionally vague only if it fails to provide people of ordinary intelligence sufficient notice of what is required. *United States v. Williams*, 553 U.S. 285, 304 (2008). Sufficient notice has never meant "perfect clarity and precise guidance." *Ison v. Madison Loc. Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 897 (6th Cir. 2021) (citation omitted). And it is a "mistake" to suggest "that the mere fact that close cases can be envisioned renders a statute vague." *Williams*, 553 U.S. at 306. The district court's hypothetical worries about the scope of Section 1(2) are that kind of mistake.

A person of ordinary intelligence would have no difficulty understanding that "government-issued identification" means a form of identification issued by the government. The district court disagreed, explaining that it is impossible for the Clinics to know "whether a birth certificate, social security card, passport, or

child identification card would be acceptable." Op., R.65, PageID#1261. But presumably the district court selected those four documents precisely because they are all obviously forms of identification issued by the government. That alone seems like good evidence that an ordinary person is on notice as to the term's meaning.

Likewise, a person of ordinary intelligence would understand what qualifies as a "reasonable attempt" to notify a second parent before consenting. "Reasonable" is one of the most common terms used in the law. Juries are instructed to find defendants guilty beyond a "reasonable" doubt. And this Court rejected a vagueness challenge to the phrase "reasonable decorum" just last year. *Ison*, 3 F.4th at 897. The same is true for "attempt," a word commonly understood to mean making an effort to do something. The district court's conclusion otherwise is searching for a problem that does not exist. *See Gonzales*, 550 U.S. at 153–54.

* * *

The Attorney General is likely to succeed on the merits that the Clinics can comply with the informed-consent requirements.

B. The Clinics can comply with the fetal-remains requirements.

The district court also enjoined enforcement of three groups of provisions that address fetal-remains disposal: Section 20(2)–(3), Section 22, and Section

23(15). Like the provisions covering informed consent, the district court held that complying with these parts of HB 3 is impossible. That is wrong.[6]

1. Start with Sections 20(2) and 20(3). Section 20(2) requires a permit from a coroner before cremating fetal remains. That permitting process already exists, and Section 20(2) simply provides that fetal remains are now covered by it. Section 20(3) allows for simultaneous cremation of fetal remains, which is not permitted for other types of cremation. Neither provision requires any forms, much less forms created by the Cabinet. And the district court gave no explanation as to why compliance with either provision is not possible.

There is no reason why the Clinics cannot comply with Sections 22(1) & (2), either. They define "fetal remains" and require an abortion provider to tell the parents about their right either to dispose of the remains themselves or have the facility do so. The law requires the parents to choose from those two options—retain guardianship over the fetal remains or relinquish that guardianship to the facility. Neither provision requires anyone to fill out a form of any kind.

[6] The Attorney General is not seeking a stay of the injunction against enforcing Section 22(3).

The district court quibbled with the word "guardianship," finding the term so unclear that the Clinics "cannot reasonably comply without additional guidance from the Cabinet." Op., R.65, PageID#1266–67. But again, the district court never explained what constitutional rule it was relying on for requiring an unspecified level of precision in the term. The Clinics did not bring a void-for-vagueness challenge, and the court did not purport to analyze the issue under that standard. Instead, it seems to have invented a rule that any law regulating abortion must precisely define its terms.

In any event, what does it matter if "guardianship" has not been defined? The meaning is obvious from context—it refers to the authority to dispose of fetal remains. The parents initially retain guardianship but can transfer those rights to the abortion provider. § 22(2)(c). And if there is any ambiguity, neither the Clinics nor the district court explained how that prevents the Clinics from otherwise complying with the statute.

Next, Section 22(4) prohibits disposing of fetal remains as medical waste, buying or selling the remains, and transporting the remains other than for select reasons. And Section 23(15) defines "pathological waste" so as to not include fetal remains. Like Sections 22(1) and 22(2), the district court largely gave no explanation why these provisions are impossible to comply with, other than its catchall

conclusion that the Cabinet must first "create[] the required forms and promulgate[] the necessary regulations." Op., R.65, PageID#1272. But neither section references forms, so the court's conclusion here is perplexing.

2. The Clinics also claimed that they cannot comply with the new disposal requirements until they contract with a third party, which they have not done. The district court agreed. In doing so, it accepted the Clinics' conclusory and procedurally improper declarations that they have not been able to secure contracts with a crematorium. *Id.* at PageID#1267. The court also held that any requirements for interring or cremating fetal remains will remain unenforceable until the Cabinet provides unspecified "forms or regulatory guidance" because "the disposal of human remains and medical waste is a highly regulated field." *Id.* at PageID#1267–68. That badly misses the mark.

First, a field being "highly regulated" does not remove an obligation to comply with legal changes. Many professions are highly regulated, but there is no right to "forms and regulatory guidance" whenever a legislature imposes new obligations. Absent a claim that the statute falls below some constitutional floor for precision (not a claim here), there is no requirement that "highly regulated fields" receive special treatment—even when that business provides abortions. *See*

EMW, 978 F.3d at 429; *accord Gonzales*, 550 U.S. at 163 ("The law need not . . . elevate [abortion providers'] status above other physicians in the medical community.").

Second, the Clinics failed to "make a clear showing" that they made a good-faith effort—not some "halfhearted attempt"—to secure third-party contracts for fetal-remains disposal. *EMW*, 978 F.3d at 440–41 (citation omitted). They provided no evidence in their motion or at the hearing showing any attempt to do so. The Attorney General raised this issue in his initial response, and neither Planned Parenthood nor EMW responded with *any* evidence at the hearing.

It was only after the evidentiary hearing that the Clinics conjured up declarations to rescue their claim. But that is too late. Rule 65 requires a preliminary-injunction hearing whenever there are "controverted facts" at issue. *See Cnty. Sec. Agency v. Ohio Dep't of Com.*, 296 F.3d 477, 484 (6th Cir. 2002). And the failure to have a hearing in which the non-moving party can contest the evidence is a per se abuse of discretion. *See id.* Yet that is precisely what happened here. By submitting their declarations after the hearing, the Clinics prevented the Attorney General from subpoenaing those witnesses and subjecting them to cross-examination. *See Am. Bd. of Trade, Inc. v. Bagley*, 402 F. Supp. 974, 975–96 (S.D.N.Y. 1975) (declining to consider an affidavit "submitted to the court after the hearing" because

"the defendants should have the right to subject [the witness] to cross examination").

The district court nevertheless accepted the conclusory declarations over the Attorney General's objections and relied on that evidence to find that the Clinics made a good-faith effort at compliance.[7] That was an abuse of discretion making it likely the Attorney General will prevail on this issue.

Even still, the Clinics' declarations hardly satisfy the good-faith standard. Those declarations contain vague assertions that the Clinics have begun to contact crematoria. R.55, PageID#1044; R.56, PageID#1062. There are no details about when those efforts started. For all we know, the Clinics did not start until weeks after they filed suit.[8] The declarations also lack detail about how many crematoria the Clinics contacted, how many they heard from, or what the potential timeline for compliance might be. And both declarations only discussed attempts to make

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[7] In denying the Attorney General's motion for a stay pending appeal, the district court stated that the Attorney General had ample opportunity to respond to the post-hearing declarations by submitting a brief or declarations of his own. Order, R.69, PageID#1315–17. But a post-hearing filing about what *the Clinics* did or can do to comply with HB 3 is no substitute for cross-examination at a hearing, which is why Rule 65 requires a hearing and why the Attorney General objected to the court considering this evidence without an opportunity for cross-examination. *See* AG Post-Hearing Br., R.63, PageID#1164–65.

[8] Planned Parenthood has been aware of this aspect of HB 3 since at least early March. *See* Resp., R.21, PageID#195 & n.2.

arrangements for cremation, but HB 3 also allows fetal remains to be interred as well. So even if these post-hearing declarations were properly considered, they fall far short of establishing more than a halfhearted attempt at compliance. *EMW*, 978 F.3d at 441.

* * *

The Attorney General is likely to succeed on his claim that the Clinics can comply with the fetal-remains requirements.

C. HB 3 does not deprive the Clinics of procedural due process.

The district court also held that the Clinics are likely to succeed on their procedural-due-process claim. That holding depends on the same errors discussed above. The court held that because the Clinics cannot comply with parts of HB 3, enforcing the law will violate their procedural-due-process rights. Op., R.65, PageID#1272–77. Because the Clinics *can* comply with the provisions discussed above, the procedural-due-process arguments necessarily fail as well. But it is worth drawing out just how wrong the district court's holding on this issue is.

To have a valid procedural-due-process claim, a plaintiff must show that he has a protected property interest, that he was deprived of that interest, and that he was not afforded the process due to him. *Women's Med. Pro. Corp. v. Baird*, 438

F.3d 595, 611 (6th Cir. 2006). The district court badly misunderstood the second and third elements.

Start with the third. Not all government actions require process. Legislative actions of general applicability, such as the General Assembly enacting HB 3, are one example. When a state enacts a law, "'the legislative process provides all the process that is constitutionally due' when a plaintiff's alleged injury results from a legislative act 'of general applicability.'" *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 217 (6th Cir. 2011) (citation omitted); *see also 37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614, 619 (6th Cir. 1997). One of the cases that the district court cited makes that very point. Op., R.65, PageID#1273 (citing *Hartman v. Acton*, No. 2:20-CV-1952, 2020 WL 1932896, *8 (S.D. Ohio, Apr. 21, 2020)).

HB 3 is a law of general applicability. For example, the informed-consent requirements apply to all minors seeking an abortion and the fetal-remains requirements apply to all such remains. The law does not single out any individuals or businesses. So the Clinics received all the process they were due when the General Assembly passed it.

Now consider the second element: the Clinics have not been deprived of anything yet. HB 3 imposes requirements that they must follow, but no government agency or actor has taken action to deprive the Clinics of anything. If they elect to disobey HB 3's requirements and a government actor levies a penalty against them, then perhaps they would be deprived of something. And *that* could require a process of some kind. *See Baird*, 438 F.3d at 612. But until that happens, there is no procedural-due-process claim.

Consider this problem a different way. Suppose that the plaintiffs sell fireworks instead of performing abortions, and that HB 3 outright prohibited the sale of fireworks in Kentucky. Could the plaintiffs block that law from going into effect on a theory of procedural due process? Of course not. Procedural due process does not prevent a legislature from regulating—or even prohibiting—certain kinds of business within a State. *See 37712, Inc.*, 113 F.3d at 619.

The district court's holding in this regard otherwise sounds in *substantive* due process, not procedural. And if the Court hears the echoes of *Lochner* in the district court's injunction, it should. The court even cited a case of *Lochner*'s vintage. Op., R.65, PageID#1273 (citing *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105 (1928)). But the Supreme Court expressly overruled *Liggett* as "a derelict in the stream of law." *N.D. Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 US. 156, 167

(1973). There can be no procedural-due-process claim as to a generally applicable law, least of all one that has yet to deprive anyone of anything.

II. The remaining factors favor a stay.

The remaining factors follow from what has been said. Enjoining enforcement of constitutional provisions of a validly enacted law irreparably harms the Attorney General and the Commonwealth. Whenever "a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (citation omitted). And because the Clinics can comply with the provisions at issue here, they will suffer no harm from staying the injunction.

In the same vein, the public interest favors a stay pending appeal: "It's in the public interest that [courts] give effect to the will of the people 'by enforcing the laws they and their representatives enact.'" *Id.* (citation omitted). And the public has an interest in minors providing the full scope of informed consent before obtaining the life-altering act of an abortion and in fetal remains being disposed of with dignity.

CONCLUSION

The Court should stay the district court's injunction pending appeal as to Section 1(2), (9), (11); Section 2(27), Section 3(12), Section 20(2)–(3); Section 22(1)–(2), (4); and Section 23(15).

Respectfully submitted by,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g) and 6th Cir. R. 32(a), I certify that this motion complies with Fed. R. App. P. 27(d)(2) because it contains 5,188 words.

This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 15-point Garamond font using Microsoft Word.

/s/ Brett R. Nolan

CERTIFICATE OF SERVICE

I certify that on May 27, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Brett R. Nolan